

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-1779-R**

*Request for Reconsideration Denied*

**PROCEDURAL HISTORY:** On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 71924). Claimant filed a timely request for hearing. On October 28, 2014, ALJ Murdock conducted a hearing, and on October 31, 2014 issued Hearing Decision 14-UI-27956, affirming the Department's decision. On November 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On November 17, 2014, claimant submitted a written argument to EAB. On December 4, 2014, EAB issued Appeals Board Decision 2014-EAB-1779 in which it affirmed the hearing decision under review. On December 8, 2014, claimant filed a request for reconsideration.

**CONCLUSION AND REASONS:** Under OAR 471-041-015(1) (October 29, 2006), a party may request that EAB reconsider a decision to correct an error of fact or law, or to explain any unexplained inconsistency with a Department rule or practice, or an officially stated Department position. In his request for reconsideration, claimant asserted that EAB made the following errors of fact or law in Appeals Board Decision 2014-EAB-1779: (1) it accepted misinformation provided by the employer regarding the alcohol test the employer administered to claimant; (2) it did not consider the proper procedure for administering a saliva test for alcohol; (3) it did not take into account claimant's pre-diabetic health condition; (4) it failed to consider claimant's written argument; and (5) it incorrectly asserted that claimant had, in his written argument, claimed that the test the employer administered was unlawful because it did not take place in a "special category laboratory." We consider each of these arguments in turn.

In support of his contentions that EAB erroneously accepted information from the employer regarding the alcohol test administered to claimant and that it erroneously failed to consider the appropriate procedure for administering a saliva test for alcohol, claimant submitted an exhibit entitled "ALCO

Screen – 2-Minute Saliva Test for Blood Alcohol” (marked as EAB Exhibit 1).<sup>1</sup> This exhibit was not offered at the October 28, 2014 hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB may consider new information only if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Claimant offered no reason why the exhibit or any of the information contained in it was not presented at the hearing. Claimant’s assertion that he is pre-diabetic is also new information; no evidence or testimony on this matter was presented at the hearing, and claimant provided no explanation why it was not. Accordingly, we will not consider claimant’s pre-diabetic status and will not admit EAB Exhibit 1 into the record.

In regard to his November 17 written argument, claimant asserted that although the “first version” of his argument did not contain certification that it was sent to the other party as required by OAR 471-041-0090(2)(a), he sent another copy of his written argument on November 17 with the required certification. Claimant submitted a copy of this “second” written argument (marked as EAB Exhibit 2).<sup>2</sup> According to claimant, EAB should now consider this “second” argument since he has complied with the requirements of the applicable rule. In Appeals Board Decision 14-UI-1779, however, we addressed the issues raised by claimant’s November 17 argument, even though we acknowledged that he failed to certify that he had sent a copy of the argument to the other parties. Accordingly, EAB Exhibit 2 is not relevant or material to our decision and will not be admitted under OAR 471-041-0090(2)(a).

Finally, we agree with claimant that we were mistaken when we concluded that claimant argued the alcohol test administered to him was unlawful because it did not occur in a “special category” laboratory.” Claimant never made such an argument. We conclude that our error was a harmless one, however; claimant has shown no reason why this mistake prejudiced his rights or interests and we can think of none.

For the reasons stated above, claimant failed to show that EAB made any error of fact or law in Appeals Board Decision 2014-EAB-1779. The request for reconsideration is denied.

**DECISION:** Claimant’s request for reconsideration is denied. Appeals Board Decision 2014-EAB-1779 remains undisturbed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE OF SERVICE:** December 18, 2014

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On

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<sup>1</sup> A copy of EAB Exhibit 1 is included with this decision.

<sup>2</sup> A copy of EAB Exhibit 2 is included with this decision.

the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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